IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 65 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HANIFABIBI ABDULMAJID

Versus

STATE OF GUJARAT

Appearance:

MR HM PARIKH for Petitioner

MR KT DAVE, APP, for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 16/06/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellant herein came to be convicted for an offence punishable under Section 20(b)(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short) and was ordered to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1 lakh, and to undergo further rigorous imprisonment for two years in event of default in payment of fine, by virtue of a judgment and order passed by the learned Additional Sessions Judge, Kheda, at Nadiad, in Special Case No.11 of 1995 on December 30, 1995.

2. The facts leading to the present appeal, in a narrow compass, can be stated thus:

2.1 Police Inspector, Nadiad Town along with other members was patrolling near the Police Station area on February 27, 1995 around 12.15 P.M. While they were passing by Ayojan Bhavan, they noticed the accused lady Bai Hanifa - standing beside the right side gate. As per the case of the prosecution, Bai Hanifa was earlier arrested in connection with an offence relating to Charas. The lady turned her face on seeing the police. The Officer, therefore, had a suspicion and he, therefore, stopped the vehicle and intercepted her. Since search was required to be undertaken, a lady Panch and a lady Constable were summoned. The accused was asked if she would like to be searched in presence of a Gazetted Officer or a Magistrate. It is the case of the prosecution that, to this proposal, she said no and, therefore, her person was searched through lady Panch and lady Constable. In the search, a handkerchief was found around her waist containing Charas. Head Constable Yakoobbhai was sent to bring the weighing scale. The contraband article found was weighed and was found to weigh 90 grams. It was shown to the Panchas and, thereafter, put into a plastic bag and then a slip containing signatures of the Panchas as well as the signature of the Police Inspector was place on that plastic bag and, thereafter, the bag was sealed with sealing wax. A detailed Panchnama was drawn. The accused was arrested and complaint was lodged by the Police Inspector in this regard for the offence under the NDPS Act. On basis of the F.I.R., an offence was registered by Nadiad Town Police and the accused was produced before Magisterial Court and remand was obtained. After the investigation was over, charge sheet was filed in the Court of learned Chief Judicial Magistrate, Kheda, at Nadiad. Since the case was triable by a Special Court under NDPS Act, the case was made over by learned Chief Judicial Magistrate to the Special Court and was registered as Special Case No.11 of 1995

(Narcotics). The learned Special Judge under the NDPS Act and Additional Sessions Judge, Kheda, at Nadiad, charged the accused vide Ex.5. The accused pleaded not guilty to the charge and expressed her desire to face the trial.

2.2 After considering the evidence led by the prosecution, the Trial Court came to a conclusion that the prosecution successfully proved the charges against the accused and after hearing the accused on question of quantum of sentence, ordered the accused to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1 lakh and ordered to undergo further rigorous imprisonment for two years in event of default in payment of fine.

2.3 Aggrieved by the said judgment and order, the accused has preferred this appeal.

3. We have heard learned advocate Mr. H.M. Parikh for the appellant and Mr. Dave, learned Additional Public Prosecutor on behalf of respondent-State.

4. Mr. Parikh has taken us through the record and proceedings. He has raised following contentions in support of the appeal:-

(1) There is non-compliance of provisions of Section 50 of the NDPS Act.

(2) There is non-compliance of Section 52 of the NDPS Act.

(3) There is non-compliance of Section 57 of the NDPS Act.

(4) There is variance in the deposition of prosecution witnesses about the procedure followed at the time of seizure.

(5) The witnesses supporting the prosecution case are only police witnesses and, therefore, in light of the fact that independent witnesses having not supported the prosecution case, their credibility has to be give a closer look. According to Mr. Parikh, their depositions do not inspire any confidence. He, therefore, urged that this appeal may be allowed and conviction and sentence challenged herein may be set aside.

5. Learned Additional Public Prosecutor, Mr. Dave,

contended that, in the instant case, the searching Officer was a Gazetted Officer and he has offered the appellant to be searched in presence of a Gazetted Officer, if she so desired. According to Mr. Dave, in fact, when the search was conducted, the Officer was not acting on prior information or was not having any knowledge about the appellant being involved in an offence under NDPS Act and, therefore, it was not imperative for him to comply with the provisions of Section 50 of the NDPS Act. He has, however, out of abundant caution, in all fairness to the accused, made an offer to be searched in presence of a Gazetted Officer and, therefore, it cannot be said that there is non-compliance of Section 50 of the NDPS Act.

5.1 Mr. Dave submitted further that, merely because word "right of being searched in presence of Gazetted Officer" is not employed by the searching officer, it cannot be said that there is non-compliance of Section 50 of the NDPS Act.

5.2 Mr. Dave submitted that, so far as the contention regarding non-compliance of Sections 52 and 57 is concerned, the record reveals that information was sent to the immediate superior as well as to the superior to the superior by wireless by the Investigating Officer and, therefore, there is compliance of Section 57. In reply to the contention that the report is not detailed, Mr. Dave has submitted that, if the wireless message is seen, it carries all the details.

5.3 So far as the contention regarding non-compliance of Section 52 is concerned, the evidence indicates that the accused was informed of the grounds of arrest and, therefore, that contention cannot be accepted.

5.4 Mr. Dave, therefore, contended that there is no merit in the appeal and the appeal may be dismissed.

6. We have given a thoughtful consideration to the contentions raised by the appellant about non-compliance of Section 50 of the NDPS Act.

6.1 The evidence, if seen, indicates that the Investigating Officer was on a patrol when he came across the appellant. On seeing the police, she turned her face which aroused suspicion in mind of the Investigating Officer. The appellant was earlier involved in an offence under the NDPS Act. The Investigating Officer, therefore, thought it fit to take search of the person of the appellant. He, therefore, summoned a lady Constable

and a lady Panch and carried out the search to ascertain whether the lady had any contraband article with her. On search, contraband Charas wrapped around the waist of the accused in a handkerchief. Before taking the search, the Investigating Officer inquired as to whether the accused would like to be searched in presence of a Gazetted Officer, to which she denied and, thereafter, search was conducted. It is amply clear from the evidence led by the prosecution that there was no prior information to the Investigating Officer nor was he acting on such prior information. There is no evidence to indicate that he had knowledge about commission of an offence under the NDPS Act involving the accused and, therefore, when the search was conducted, it cannot be said that it was conducted by the Officer under the provisions of Sections 41, 42 and 43 of the NDPS Act, as contemplated under Section 50 of the Act and, therefore, in our view it was not imperative for the searching officer to comply with the requirement of Section 50 of the NDPS Act.

6.2 Much was argued on behalf of the appellant about a statement in the Panchnama that the accused was informed that she was to be searched for Charas, but it is to be noted that the officer who conducted the search in presence of Panch has not deposed to that effect nor does it emerge from his F.I.R. (Ex.17). All that is stated in the F.I.R. is that the accused was informed that it is suspected that she may have Charas in her possession and, therefore, she is required to be searched. Suspicion cannot take place of knowledge and, therefore, it cannot be said that the search was conducted on either prior information or with previous knowledge of an offence under the NDPS Act. No question in this regard is put to the Searching Officer/complainant Mr. Narhari Patel in respect of prior knowledge about breach of provision of NDPS Act by the accused before the search except a stray suggestion that lady Constable was informed by him that accused is to be searched for Charas which is denied by him. Therefore, in our view, in this case, the search would not be governed by Section 50 of the NDPS Act.

6.3 Assuming for a moment that the search was conducted for an of offence under NDPS Act and, therefore, Section 50 ought to have been complied with, then also the evidence indicates that the accused was offered to be searched in presence of a Gazetted Officer or an option was given to the accused to call an Gazetted Officer and get the searching team searched in his presence so also the accused herself. Of course, the language employed in doing so indicates that the accused

was offered her right of being searched in presence of a Gazetted Officer. Only she was not told that she has a 'right' of being searched in presence of another Gazetted Officer or a Magistrate. The question, therefore, is whether merely offering the accused to be searched in presence of a Gazetted Officer would amount to compliance of requirements of Section 50 of the NDPS Act.

6.4 In this regard, Mr. Parikh pressed into service the decision in the case of State of Punjab v. Baldev Singh, (1999) 6 SCC 172 and the decision in the case of K. Mohanan v. State of Kerala, (2000) 10 SCC 222 and urged that ther is non-compliance of Section 50 as the accused is not informed of "existence of a right to be searched in presence of a Gazetted Officer". In the case of State of Punjab v. Baldev Singh, the Apex Court observed that there is unanimity of judicial pronouncements to the effect that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a Gazetted officer or a Magistrate and that the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. Thus, it is clear that by virtue of this pronouncement, an obligation or duty is cast on the empowered officer conducting a search, on basis of prior information.

6.5 Mr. Parikh has then placed reliance on K. Mohanan v. State of Kerala to indicate that the accused has to be informed of his right of being searched in presence of a Gazetted Officer or the nearest Magistrate. It is clear from that decision that reliance was placed on the decision in the case of State of Punjab v. Baldev Singh, wherein it was held that it is imperative for the searching officer to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate, if the officer is acting on prior information. It was held that mere asking whether the person to be searched requires to be searched in presence of a Gazetted Officer or a Magistrate cannot be treated as communicating to him that he had a right under the law to be searched and, therefore, it was held that there is non-compliance of Section 50 of the Act.

6.6 Both the decisions cannot help the appellant, as in the case before us, the search was not conducted on basis of prior information.

6.7 It may be noted that a Larger Bench of the Apex Court in Joseph Fernandez v. State of Goa, (2000) 1 SCC 707 held that if the searching officer says that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate", it would amount to substantial compliance with the said requirement. It was observed that in such an eventuality, it cannot be said that there was non-compliance with mandatory provision contained under Section 50 of the Act. It was further observed that such an offer is a communication about the information that the appellant had a right to be searched so. The Court also observed that, in that case, when the search was conducted, the officer had only the provision of Section 50 of the NDPS Act in his mind not aided by the interpretation of the said section made by the Constitution Bench of the Apex Court in the case of Baldev Singh (supra).

6.8 Likewise, in the case of P.P. Beeran v. State of Kerala, JT 2001(4) SC 184, another three Judges Bench of the Apex Court held that offer made to conduct the search in presence of a Magistrate or a Gazetted Officer which was denied by the person to be searched amounted to compliance of Section 50 of the NDPS Act and did not call for any interference at the hands of the Apex Court.

6.9 In light of the above discussion, the decision relied upon by Mr. Parikh in the case of K. Mohanan v. State of Kerala will not help the appellant.

6.10 It would be appropriate to refer to the observation made by the Apex Court in the case of C.I.T. v. Sun Engg. Works (P) Ltd., (1992) 4 SCC 363. The Apex Court observed thus :-

> "It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court

> and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."

The said decision was again relied on by the Constitution Bench in the case of State of Punjab v. Baldev Singh. We are, therefore, not able to accept the contention raised by Mr. Parikh to the effect that Section 50 was not complied with. If the facts of the present case are seen, the search was conducted prior to the interpretation of Section 50 by the Constitution Bench of the Apex Court and considering the fact that the officer was not acting on prior information or with prior knowledge and the fact that he had offered the person to be searched, to be searched in presence of a Gazetted officer or a Magistrate, if she so desired, we hold that there was sufficient compliance of Section 50 in the instant case.

7. So far as non-compliance of section 57 is concerned, it is clear from a reading of Ex.18 that a wireless message was sent to the D.S.P. and Dy.S.P., Nadiad, by Police Inspector, Nadiad, i.e. the Investigating Officer providing full details of the incident, namely, Crime Register number; name of the complainant; name of the accused; date, time and place of incident; time of registering the offence; quantum of contraband seized; name of the Investigating Officer; and brief details of the incident. The contention, therefore, that the said report cannot be considered as a "full report of all the particulars of such arrest or seizure" as contemplated under Section 57 cannot be accepted. It is also clear that the said wireless message was sent on that very day, i.e. within the time limit of 48 hours provided under Section 57 of the NDPS Act. The contention, therefore, that there was non-compliance of Section 57 cannot be accepted.

8. So far as the contention that there was non-compliance of Section 52 of the NDPS Act is concerned, it may be noted that the Investigating Officer in his deposition (Ex.16) clearly stated that while arresting the appellant, he had informed her about the ground of arrest and the quantity of contraband seized, in writing and that her signature was obtained on the office copy. It also requires to be noted that this aspect is not challenged during the cross-examination. In fact, there appears no cross-examination on this

aspect of the evidence of the Investigating Officer. Therefore, it is not possible to accept that contention taken on behalf of the appellant.

9. It may be noted that, in the instant case, the Panch witnesses have not supported the prosecution case and the case of the prosecution was tried to be proved only on evidence of the police witnesses. It is now a settled proposition of law that evidence of police witnesses cannot be thrown over board in such cases. It would only call for a close scrutiny. We have given a close look to the evidence and we do not find any material to suspect the case as advanced by the prosecution. It is not the case of the defence that the Investigating Officer had any enmity against the accused. There was no reason for the Investigating Officer to falsely implicate the accused-appellant. The evidence of the police witnesses otherwise is consistent and reliable and has to be accepted.

9.1 It is true that there is some discrepancy in deposition of one of the police witnesses regarding taking of samples, but even if that part of the evidence is disbelieved, it will not affect the deposition of other police witnesses regarding seizure of contraband.

10. Taking an overall view of the evidence on record, it cannot be said that the learned Trial Judge has committed any error in convicting the accused and we do not deem it necessary to interfere with the finding of the learned Trial Judge. The appeal, therefore, must fail and, hence, the same is dismissed. The judgment and order of the learned Additional Sessions Judge, Nadiad, in Special Case No.11 of 1995 dated the 30th December, 1995 is hereby confirmed.

[B.C. PATEL, J.]

[A.L. DAVE, J.]

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